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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 43119 & 43121
Plaintiff-Respondent,)	
)	Jerome County Case Nos.
v.)	CR-2006-555 & CR-2014-5175
)	
MICHAEL R. MURPHY,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issues

1. Has Murphy failed to establish that the district court abused its discretion in docket number 43121 by imposing a unified sentence of 14 years, with six years fixed, upon his guilty plea to possession of methamphetamine, and a concurrent determinate five-year sentence upon his guilty plea to destruction, alteration or concealment of evidence?

2. Has Murphy failed to establish that the district court abused its discretion in docket number 43119 by revoking his probation and executing his underlying unified sentence of 20, years with 10 years fixed, imposed upon his guilty plea to trafficking in the immediate precursors of methamphetamine?

3. Has Murphy failed to establish that the district court abused its discretion by denying his Rule 35 motions for reconsideration of his sentences in both cases?

Statement Of The Facts And Course Of The Proceedings

In docket number 43119, Murphy pled guilty to trafficking in the immediate precursors of methamphetamine and the district court imposed a unified sentence of 20 years, with 10 years fixed, and retained jurisdiction for 180 days. (43119 R., pp.175-82.¹) After a period of retained jurisdiction, the district court suspended Murphy's sentence and placed him on probation for seven years. (43119 R., pp.190-98.)

In December 2013, Murphy was required to serve 30 days of discretionary jail time for consumption of methamphetamine. (43119 R., pp.208-09.) Shortly thereafter the state filed a Motion to Revoke Probation alleging that Murphy had violated his probation by using methamphetamine, and testing positive for both methamphetamine and marijuana. (43119 R., pp.211-16.) Murphy admitted to violating his probation as alleged, and the district court revoked probation, ordered Murphy's underlying sentence executed, suspended the sentence and reinstated Murphy on probation for three years. (43119 R, pp.244-56.)

Approximately six months later, police received a tip that Murphy was selling methamphetamine out of his home. (43121 R., pp.9-13.²) Two Jerome Police officers were dispatched to Murphy's home to investigate and subsequently made contact with Murphy, his wife, and two other individuals. (43121 R., p.10.) While officers were investigating, Murphy attempted to swallow a plastic baggie and forcefully resisted officers' attempts to stop him. (Id.) The officers were eventually able to restrain

¹ Citations to the 43119 Record are to the electronic file "Appeal #43119 Michael R. Murphy.pdf."

² Citations to the 43121 Record are to the electronic file "Appeal #43121 Michael Murphy.pdf."

Murphy, who then spit out a plastic baggie containing over three grams of methamphetamine. (Id.) A subsequent search of Murphy's residence pursuant to a search warrant located large quantities of methamphetamine and marijuana, as well as digital scales and other drug paraphernalia. (43121 R., pp.10-11.)

The state charged Murphy with misdemeanor resisting/obstructing officers; misdemeanor possession of drug paraphernalia; two counts of felony battery on a police officer; felony possession of methamphetamine (a second or subsequent offense); felony destruction, alteration or concealment of evidence; and a persistent violator sentencing enhancement in docket number 43121. (43121 R., pp.63-67.) In docket number 43119, the state filed a new Motion to Revoke Probation alleging Murphy had violated his probation by committing the new crimes in docket number 43121. (43119 R., pp.259-62, 266-78.)

Pursuant to a plea agreement in docket number 43121, the state amended the two felony counts of battery on a police officer to misdemeanors and agreed to dismiss the remaining misdemeanor charges and the persistent violator sentencing enhancement. (43121 R., pp.112-14, 117-18.) Murphy subsequently pled guilty to the two misdemeanor counts of battery on a police officer, as well as the felony charges of possession of methamphetamine (a second or subsequent offense) and destruction of evidence. (43121 R., p.118.) He also admitted to violating his probation as alleged in docket number 43119. (43119 R., pp.294-95.) At the consolidated sentencing hearing, the district court revoked Murphy's probation in docket number 43119, and ordered his underlying sentence executed without reduction. (43119 R., pp.300-04.) In docket number 43121, the district court imposed 365 days in jail on each of the misdemeanor

battery charges, imposed a unified sentence of 14 years with six years fixed for the enhanced possession charge, and imposed a fixed five-year sentence for the destruction of evidence charge; all four sentences to run concurrently with each other and with Murphy's sentence in docket number 43119. (43121 R., pp.131-39.) Murphy timely appealed from the district court's order revoking probation in docket number 43119 and from the judgment of conviction in docket number 43121, and timely filed Rule 35 motions for reconsideration of his sentences in both cases, which the district court denied. (43119 R., pp.305-12, 318-25; 43121 R., pp.144-51, 157-64.)

ARGUMENT

I.

Murphy Has Failed To Establish That The District Court Abused Its Sentencing Discretion In Docket Number 43121

Murphy asserts his sentence in docket number 43121 is excessive in light of his ongoing substance abuse issues and desire for treatment, his acceptance of responsibility and purported remorse for his actions, his positive employment history, and the support of his family. (Appellant's brief, pp.5-10.) The record supports the sentence imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear

abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The maximum prison sentence for possession of methamphetamine, a second or subsequent offense, is 14 years. I.C. §§ 37-2732(c)(1) and 37-2739. The maximum prison sentence for destruction, alteration or concealment of evidence is five years. I.C. § 18-2603. The district court imposed an aggregate unified sentence of 14 years, with six years fixed, which falls well within the statutory guidelines. (43121 R., pp.131-39.) This is Murphy's fourth felony drug charge and third felony drug conviction. (43121 PSI, pp.6-8, 10-12.³) Despite previously completing a period of retained jurisdiction with substance abuse programming and treatment in the community, Murphy has continued to consume and sell methamphetamine, and continued to disregard the terms of his community supervision. (43119 R., pp.208, 213-14, 268-70; 43121 PSI, pp.18-19.)

The circumstances surrounding Murphy's arrest in this matter are also remarkably similar to those of his arrest in docket number 43119. In docket number 43119 probation and parole officers requested the assistance of Jerome Police in a search of Murphy's home. (43119, R., pp.16-17.) During the search, officers located "several baggies that had been tied and torn or cut" in Murphy's bedroom, which they noted is "common in the packaging of controlled substances." (43119 R., p.16.) Also

³ Citations to the 43121 PSI are to the electronic file "43121 Murphy Conf Exhibits.pdf."

located in the bedroom was 2.1 grams of marijuana, assorted drug paraphernalia, a digital scale, and “several thousand” Pseudoephedrine pills. (43119 R., pp.16-17.) In docket number 43121 Jerome Police officers were dispatched to Murphy’s house on a tip that he and his wife were selling methamphetamine. (43121 R., p.9.) A subsequent search of the house located over 31 grams of methamphetamine, over 42 grams of marijuana, two digital scales, and multiple items of drug paraphernalia. (43121 R., pp.10-11.) Also present at the home was Kenneth Kiefer, who admitted to police that he was there to purchase methamphetamine from Murphy and his wife, and admitted he had been doing so for several months. (43121 R., pp.9-10.) Murphy’s sentence is appropriate based on his crime, his ongoing criminal offending, and his failure to rehabilitate or be deterred despite prior treatment opportunities and legal sanctions.

II.

Murphy Has Failed To Show That The District Court Abused Its Discretion By Revoking His Probation In Docket Number 43119

Murphy next asserts the district court abused its discretion by revoking his probation in docket number 43119. (Appellant’s brief, pp.10-12.) “Probation is a matter left to the sound discretion of the court.” I.C. § 19-2601(4). The decision to revoke probation lies within the sound discretion of the district court. State v. Roy, 113 Idaho 388, 392, 744 P.2d, 116, 120 (Ct. App. 1987); State v. Drennen, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992). When deciding whether to revoke probation, the district court must consider “whether the probation [was] achieving the goal of rehabilitation and [was] consistent with the protection of society.” Drennen, 122 Idaho at 1022, 842 P.2d at 701.

Murphy is not an appropriate candidate for continued probation, nor was his probation achieving the goal of rehabilitation. As stated above, Murphy has continued his use of illegal substances while on probation and has now been convicted of his third drug related felony. (43119 R., pp.208, 213-14, 268-70; 43121 R., pp. 131-39; 43121 PSI, pp.18-19.) The probation officer recommended imposition of Murphy's sentence and stated, "It is apparent that once Mr. Murphy starts using illegal drugs in the community he does not stop without severe intervention like incarceration." (43119 R., pp.214, 270.) At the consolidated sentencing and probation violation disposition hearing, the district court articulated the correct legal standards applicable to its decision and also set forth in detail its reasons for finally revoking Murphy's probation. (Tr., p.40, L.4 – p.42, L.5.) The state submits that Murphy has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the March 30, 2015 sentencing/probation violation disposition hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

III.

Murphy Has Failed To Show The District Court Abused Its Discretion By Denying His Rule 35 Motions For Reconsideration of His Sentences

Murphy next asserts that the district court abused its discretion when it denied his Rule 35 motions for reconsideration of his sentences in both cases in light of his participation in programming while in the Jerome County jail, his status as an inmate worker, and his amenability to treatment. (Appellant's brief, pp.12-13.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To

prevail on appeal, Murphy must “show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion.” Id. Murphy has failed to satisfy his burden.

Murphy provided no new information in support of his Rule 35 motions. Information with respect to his performance while on probation, his employment, his programming and inmate worker status while in the Jerome County Jail, people willing to sponsor him in the community, and his desire for treatment in the community was available at the time of the sentencing and disposition hearing. (Tr., p.35, L.10 – p.39, L.8.) The district court was also aware of the reasons behind Murphy’s prior decision not to participate in Drug Court; as such, this was also not new information before the court. (Tr., p.41, Ls.3-14.) Because Murphy presented no new evidence in support of his Rule 35 motions, he failed to demonstrate in the motion that his sentences were excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court’s order denying his Rule 35 motions in both cases.

Conclusion

The state respectfully requests this Court to affirm Murphy's conviction and sentence in docket number 43121, the district court's order revoking his probation in docket number 43119, and the district court's orders denying Murphy's Rule 35 motions filed in both cases.

DATED this 14th day of October, 2015.

/s/
LORI A. FLEMING
Deputy Attorney General

CATHERINE MINYARD
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of October, 2015, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

<p>1 to do so.</p> <p>2 THE COURT: All right. Anything else?</p> <p>3 THE DEFENDANT: No, Your Honor.</p> <p>4 THE COURT: All right. The Court, for</p> <p>5 purposes of sentencing and disposition in both</p> <p>6 cases, does still consider the four goals of</p> <p>7 sentencing. Certainly given the nature of the</p> <p>8 underlying offense, the Court does recognize that</p> <p>9 protection of society is this Court's primary</p> <p>10 concern. The Court also does consider the related</p> <p>11 goals of rehabilitation, retribution, and</p> <p>12 deterrence, as well as those factors under 19-2521</p> <p>13 to determine whether probation or some form of</p> <p>14 incarceration is appropriate. The Court does</p> <p>15 consider the character of the offender, the nature</p> <p>16 of the underlying offenses, as well as the</p> <p>17 defendant's prior record and prior performance on</p> <p>18 probation.</p> <p>19 Certainly, the Court is aware that you</p> <p>20 have a new felony offense. Certainly, you were on</p> <p>21 probation for trafficking and precursors. The</p> <p>22 indications are that you had a large quantity of</p> <p>23 both methamphetamine as well as marijuana in your</p> <p>24 possession. While I understand that the nature of</p> <p>25 the charge is merely possession, there is also</p> <p style="text-align: center;">40</p>	<p>1 evidence to indicate that you were perhaps selling</p> <p>2 or offering drugs to others.</p> <p>3 Counsel are correct that you were</p> <p>4 previously offered the opportunity of drug court,</p> <p>5 and I recognize the position that you took that your</p> <p>6 treatment provider did not think drug court was</p> <p>7 necessary. I also note that it was back in 2010</p> <p>8 that your probation officer requested of this Court</p> <p>9 because you were doing well on probation, to only</p> <p>10 order UAs at the discretion of your probation</p> <p>11 officer rather than requiring you to submit to UAs</p> <p>12 as a requirement every week. We don't know what it</p> <p>13 was that we didn't catch, because perhaps you</p> <p>14 weren't UAing as frequently as you were.</p> <p>15 You were close to being off probation the</p> <p>16 first time, and, you know, you knew for yourself</p> <p>17 whether you had a problem, and I think you had a</p> <p>18 problem then that you knew about that perhaps you</p> <p>19 hadn't communicated fully to Ms. Stowe. And perhaps</p> <p>20 if had you taken drug court, you wouldn't be here</p> <p>21 today, but you are. And I can't ignore the serious</p> <p>22 nature of your original felony that you were on</p> <p>23 probation for at the time.</p> <p>24 So in CR-2006-555, the Court, having</p> <p>25 revoked your probation, will reimpose the original</p> <p style="text-align: center;">41</p>
<p>1 sentence of 20 years, 10 fixed, 10 indeterminate not</p> <p>2 to exceed 20. Credit for time served is 605 days.</p> <p>3 The Court will reimpose the fine of \$2,000 to the</p> <p>4 extent unpaid. My understanding is, however, the</p> <p>5 restitution's been paid in full.</p> <p>6 In CR-2014-5175, as to the charge of --</p> <p>7 in Count III, battery on a peace officer, a</p> <p>8 misdemeanor, the Court will impose total court</p> <p>9 costs. The Court will not impose any fine. The</p> <p>10 Court will impose 365 days of county jail.</p> <p>11 Count IV, battery upon certain personnel,</p> <p>12 a misdemeanor. Again, total court costs, no fine,</p> <p>13 jail time of 365 days.</p> <p>14 Count V, possession of a controlled</p> <p>15 substance with the enhancement, total court costs.</p> <p>16 The Court will require that you reimburse the</p> <p>17 department of a sum not to exceed \$100 for the PSI.</p> <p>18 The Court will impose a fine of \$2,500. The Court</p> <p>19 is going to impose penitentiary time of 14 years,</p> <p>20 6 years fixed, 8 years indeterminate not to exceed</p> <p>21 14.</p> <p>22 Count VI, destruction, alteration or</p> <p>23 concealment of evidence, the Court will impose total</p> <p>24 court costs, no fine, 5 years unified, 5 years</p> <p>25 fixed, no indeterminate. Credit for time served is</p> <p style="text-align: center;">42</p>	<p>1 164 days on all counts.</p> <p>2 The Court will order Counts III, IV, V</p> <p>3 and VI to run concurrent. The Court is also going</p> <p>4 to order that this sentence shall run concurrent</p> <p>5 with the sentence imposed in CR-2006-555. The Court</p> <p>6 will order law enforcement agency restitution in the</p> <p>7 amount of \$1,142.01. That will be \$199.30 for the</p> <p>8 Jerome City Police Department, \$300 for Idaho State</p> <p>9 Police Forensic Services, and \$642.71 for the Jerome</p> <p>10 County Prosecuting Attorney's Office.</p> <p>11 The Court notifies the defendant he does</p> <p>12 have 42 days from the file stamp within which to</p> <p>13 appeal. If he cannot afford the cost of the appeal</p> <p>14 in either case, he may proceed in forma pauperis.</p> <p>15 Direct the clerk to enter judgment in</p> <p>16 both cases. Order the return of the presentence</p> <p>17 reports, and order the defendant committed to the</p> <p>18 sheriff for delivery to the State Board of</p> <p>19 Corrections.</p> <p>20 Anything further?</p> <p>21 MS. DEPEW: No, Your Honor. Thank you.</p> <p>22</p> <p>23 (Recess.)</p> <p>24</p> <p>25</p> <p style="text-align: center;">43</p>